Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RORY M. WALSH, INDIVIDUALLY, AND
AS NATURAL GUARDIAN FOR CRW, A MINOR, AND
AS NATURAL GUARDIAN FOR SJW, A MINOR

Petitioners

v.

DR. ROBERT KRANTZ
THE DALLASTOWN AREA SCHOOL DISTRICT
JUDY KEENEY

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Appeal from a Federal District Court's decision is an inalienable right. Petitioner Walsh captured ten (10) issues for appeal and the 3rd Circuit only ruled on nine (9), hence the 3rd Circuit has failed to complete its actions and uphold Petitioner Walsh's rights. This fact alone warrants the issuance of Certiorari for the 3rd Circuit to complete their required duties and uphold Petitioner Walsh's (and those of his two sons he raises alone) rights so violated.

This petition, and the underlying lawsuit, deal with a very important issue; whether an abusive school principal can eavesdrop on a private telephone conversation and then confront the persons legally on the hard-wired telephone with the contents of that same protected conversation, this being the third (3rd) private telephone call he illegally intercepted/manipulated. See *Katz v United States* 389 US 347 (1967).

Three questions are presented for the **Supreme Court**

I. Whether an abusive school principal can eavesdrop on a private telephone conversation and then confront the persons legally on the hard-wired telephone with the contents of that same protected conversation, this being the third (3rd) private telephone call he illegally intercepted/manipulated. See *Katz v United States* 389 US 347 (1967).

II. Whether the federal district court can, in an act of speculative judicial activism, dream up his own conclusion, unsupported by any evidence or testimony, to throw the case out and award the defendants summary judgment. See FRAP 10(b)(2); Unsupported Finding or

Questions Presented (continued)

Conclusion. The 3rd Circuit failed to rule on this issue.

III. Whether the 3rd Circuit Court of Appeals, after petitioner caught the appellees chopping up Petitioner Walsh's filings, suppressing evidence and planting evidence in the 3rd Circuit, then making it look like Petitioner Walsh did it, fail to remand this case. See 18 U.S.C. §1512 (b). This is a serious crime that continues uninvestigated and unpunished. This is an incredible act of obstruction of justice, before the 3rd Circuit Court of Appeals. The 3rd Circuit failed to take ANY action on this crime before it.

LIST OF PARTIES

(in addition to those listed on the cover page)

Mrs. Shari A. Young
Dr. Sue A. Cathcart
Ms. Kelley Heisey
Dr. Stewart Weinberg
Ms. Cathy Stone
Mr. Greg Anderson
Ms. Carol Stein

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Rory M. Walsh, and his sons CRW and SJW, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the 3rd Circuit (3rd Circuit 10-1217) has not yet been published. It may be found at 2010 U.S. App. Lexis 14253 (3rd Cir. July 12, 2010). A copy of the opinion of the United States Court of Appeals for the Third Circuit, which upheld the decision of the lower court while failing to rule on the lower court's speculative judicial activism, is contained in the Appendix (App. A). A copy of the decision of the United States Court of Appeals for the Third Circuit, which denied Petitioner Walsh's petition for rehearing is contained in the Appendix (App. B). A copy of the decision of the United States Court of Appeals for the Third Circuit, which failed to take corrective action when Petitioner Walsh reported his filings had been altered by the opposing counsel, ordering Walsh not to submit any more filings is contained in the Appendix (App. C). The District Court order, wherein the lower court relied on prohibited speculative judicial activism to throw the case out (see FRAP 10(b)(2); Unsupported Findings or Conclusions) is contained in the Appendix (App. D).

Petitioner Walsh's petition for rehearing by the 3rd Circuit was denied on 5 Aug 2010 such that this Petition for Writ of Certiorari is timely.

JURISDICTION

The Third Circuit affirmed the order of the District Court awarding Summary Judgment to the respondents on July 12, 2010. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

This case involves the illegal intercept of a private telephone conversation between a single father and his son by a school principal, who then made a record of the contents of that same protected telephone conversation and confronted Petitioner Walsh with the contents, in violation of the 4th Amendment. See *Katz v United States* 389 US 347 (1967). This being the third instance this same abusive school principal illegally intercepted/redirected private telephone calls between petitioner Walsh and his son minor CRW.

STATEMENT OF THE CASE

This has been an extremely tortuous legal action, with the lower court recognizing the filings of Attorney Sharon O'Donnell as elucidating the allegations in the amended complaint, then creating a bold faced lie to throw the case out. Yes, the lower court utilized speculative judicial activism, wherein the lower court lied to find a reason to throw the case out. Upon appeal, the petitioner caught the appellees not only planting evidence at the 3rd Circuit Court of Appeals, but then making it look like petitioner Walsh did it, and relied on the planted evidence. When this was brought to the attention of the 3rd Circuit Court of Appeals, they refused to allow

Petitioner Walsh to make any more filings.

Petitioner Walsh, formerly employed as a computer consultant, was brought into the Middle District of Pennsylvania due to a lucrative job offer. Deciding to reside in Dallastown, Pennsylvania, Walsh enrolled his children, that he raises alone, in the Dallastown Area School District.

During September 2004, minor CRW entered the Dallastown Middle School, at that time the principal of that school was Respondent Krantz. Abusive events began immediately, with the arrival of one of Krantz' staff at petitioner Walsh's door, doing nothing but insulting Walsh. During December 2004, Walsh was pulled to Troy NY for a consulting position, forcing him to withdraw his children from the Dallastown school temporarily. Krantz let it be known he was glad to have forced Walsh out.

In September 2005, with the contract in Troy NY completed, Walsh re-enrolled his children in the Dallastown Schools where they reside; public education is a state right. Immediately, Krantz and his staff made it known he did not want Walsh, or his sons in his school. Krantz and his staff demanded minor CRW, an honor student, receive a psychological evaluation. Walsh refused. When Walsh reported the abusive antics of one teacher; Ms. Shari A. Young, abusing her students in her classroom, and reducing some to tears, Krantz demanded Walsh leave work and appear in his office. Walsh refused. Each time Walsh entered the school to discuss minor CRW's progress, Krantz had Judy Keeney prepare an arrest warrant for Walsh, and Krantz would sit across his office with the arrest warrant held to his chest, ready to order Walsh's arrest. Walsh knew better.

Repeatedly, during 2005 and 2006, Krantz,

along with Carol Stein and Judy Keeney, two of his secretaries, would illegally manipulate Walsh's telephone calls, claiming it was minor CRW on the phone, when it would again be Krantz, again insulting Walsh. Finally on 29 Mar 2006, Krantz illegally eavesdropped on the second call Walsh made to the school, then sent Walsh an email with the contents of that same protected private conversation. This is not only a violation of the 4th Amendment, but also a crime, with recovery provisions.

Walsh filed his claim, and when Walsh moved to have Krantz arrested, Krantz was removed from his position of authority, and the school sat without a principal for three (3) months until the arrival of Dr. Joshua Doll in 2007.

With the terse denial of Walsh's claims by Attorney Rehmeyer, the Dallastown retained counsel, Walsh filed his federal action. After the lower court recognized the filings of Attorney Sharon O'Donnell helped to elucidate Walsh's claims, Walsh was allowed to proceed with his claims regarding the Federal Wiretap Act; 18 USC 2511, the Pennsylvania Wiretap Act; 18 Pa. Cons Stat Ann. §§ 5703, 5704, and 5725, and the Fourth Amendment under 42 USC §1983. After initially restricting Walsh's efforts in discovery in violation of Federal Law, discovery commenced once the initial motions to dismiss were ruled upon. The respondents resisted discovery, and not a single discovery issue was ruled on in Walsh's favor. Case in point; during December 2005, Krantz attempted to order Walsh into his office, from his place of work, for nothing minor CRW did, but because Krantz had become accustomed to belittling parents at his whim. While Walsh retained some of those heated emails from Krantz and Weinberg, Walsh did not have all of them. The respondents failed to provide them.

At the dispositive motion phase, Walsh still had three defendants and three counts. The federal action remained a robust and powerful case. Then the lower court again exercised his pointed animosity; he allowed the respondents to file an incomplete Statement of Material Fact, after previously warning them the importance of bolstering it with evidence, and then LIED to throw the case out.

Within his order of 18 Dec 09 (docket 202, page 3, item 10) the lower court (CC Conner) (Appendix D) makes up his own hypothetical reason, totally unsupported by the evidence. CC Conner states, "for instance, by unintentionally overhearing CRW mention it, or by speaking to someone else who knew it." This is a false conclusion and clearly speculative judicial activism. Both persons legally on the phone; Appellants Walsh and minor CRW, emphatically stated Krantz was not spoken to during or after the second call on 29 Mar 06. Further, none of the appellees offered such testimony; it was conjured up by the lower court. See FRAP 10(b)(2). This BOLD-FACED LIE by the lower court is specifically prohibited by FRAP 10(b)(2).

Walsh then timely filed his appeal. Per the FRAP, Walsh contacted the attorneys who had entered their appearance regarding the contents of the joint appendix. They did not bother to respond. Further, they also did not properly file those additional portions of the record they wanted the Court of Appeals to consider. INSTEAD, they relied on their criminal contacts within the 3rd Circuit Court of Appeals Clerks' Office, to chop up Walsh's filings, suppress Walsh's evidence, and plant their own contrary evidence and make it look like Walsh relied on their planted evidence. When Walsh brought this incredible crime to the attention of the 3rd Circuit, they refused to take action and ordered Walsh to make no more filings. See Appendix C.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE 3RD CIRCUIT IS NOT CONSISTENT WITH THE RULINGS OF THE SUPREME COURT REGARDING 4TH AMENDMENT VIOLATIONS.

The panel decision conflicts with the decision of the United States Supreme Court in *Silverman v United States* 365 US 505 (1961) and *Katz v United States* 389 US 347, 88 (1967). Petitioner Walsh's private telephone call to his son minor CRW, while sitting in his office cubicle in Bridgewater New Jersey, to his son in Dallastown had an expectation of privacy, and Walsh did not have to ask for it. Further, why should Appellants' have to ask for privacy, when neither were aware appellee Krantz was illegally eavesdropping on that protected conversation from his adjacent office? The 3rd Circuit's ruling panel wrongly assumed Walsh's call, through the telephone line, was in some way exposed to the public. The lower court had already upheld that same expectation of privacy, yet the ruling panel failed to realize it has already been ruled on and upheld. The respondents boldly claimed that Walsh's conversation with his son, through hardwired telephones was in some way made public, without referring to any evidence from either persons at the Middle School or co-employees from Phillips Van Heusen, where Petitioner Walsh worked at that time. The protected call was, and remains, private and is protected by the 4th Amendment. Walsh did not expose it to the public, and the respondents have produced no evidence he did so.

Other decisions point to properly remanding this issue for trial. As discussed in *Kline v Security Guards,*

Inc. 159 F. Supp. 2d 848 854 (E.D. Pa. 2001), another case of an illegal intercept, the open animosity of the officers towards Kline was deemed dispositive. Similarly, Krantz open animosity towards Walsh and his sons is a dispositive factor in this case also. Further, as upheld in *PBA Local No 38 v Woodbridge Police Dept* 832 F. Supp 808, 819 (D.N.J. 1993), holding, "there does not have to be an expectation of privacy to maintain a violation of the Federal Wiretapping Act."

Respondent Krantz eavesdropping activities on 29 Mar 06 violated the privacy upon which petitioner Walsh justifiably relied while using his hard wired telephone at his place of work in Bridgewater, NJ, and thus constituted a prohibited "search and seizure" within the meaning of the 4th Amendment.

By listening in, and then sending a heated email to Petitioner Walsh discussing the content of that second protected telephone call on 29 Mar 06, Krantz violated the 4th Amendment. The 4th Amendment governs not only the seizure of tangible items, but extends to the recording of oral statements. Krantz email was an illegal written record of that illegal eavesdropping. *Silverman v United States* 365 US 505 (1961).

Krantz has produced no warrant authorizing his illegal eavesdropping on 29 Mar 06, with this being the third time he has intercepted/re-routed Walsh's calls to his minor son CRW. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial process," *United States v Jeffers*, 342 US 48 (1951), and that searches conducted outside the judicial process without prior approval of judge or magistrate, are per se unreasonable under the Fourth Amendment. *Katz* at footnote 18; referring to *Jones v United States* 357 US 493, 497-499 (1958), *Rios v United States* 364 US 253,

261 (1960); *Chapman v United States* 365 US 610, 613-615 (1961); *Stoner v United States* 376 US 483, 486-487 (1964).

II. PETITIONER WALSH AND MINOR CRW ARE PROTECTED FROM RESPONDENT KRANTZ INTRUDING EAR BY THE 4TH AMENDMENT.

Krantz actions, illegally and surreptitiously listening in on that second protected call on 29 Mar 06, constituted a "search and seizure" under the 4th Amendment. See *Katz v United States* 389 US 347 (1967), Pp 350-353. The 4th Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements. *Silverman v United States* 365 US 505, 511 (1961). Krantz has produced no warrant authorizing his illegal seizure. The 4th Amendment protects people, not places. Walsh and his son had an expectation of privacy, and did not have to ask for it; both were unaware Krantz was illegally listening in on that second protected conversation on 29 Mar 06.

Nor was it exposed to the public, as the counsel for the respondents boldly state. The lower court already ruled that we are not discussing cell phones, the phones in question were hard-wired phones. The ruling panel also dismissed the 4th Amendment claim, yet points to no testimony or fact showing Walsh or his son exposed their call to the public. The lower court denied it by conjuring up a lie totally unsupported by any testimony (see FRAP 10 (b)(2)).

Nor has there been any testimony that, particularly Walsh's end of the conversation, was overheard; the respondents have produced no witnesses from

Phillips Van Heusen in Bridgewater, NJ (where Walsh was employed on 29 Mar 06) who claimed or testified that they overheard Walsh's conversation with his son on 29 Mar 06. Then how can the ruling panel claim it was exposed to the public? That statement was false, and should precipitate the issuance of certiorari remanding these issues for trial.

The Supreme Court has extended protection under the 4th Amendment to arbitrary searches and seizures by state officers; see *Elkins v United States* 364 US 206, 213 (1960) and *New Jersey v TLO* 469 US 325 (1985). As a state officer, Krantz remains liable under the 4th Amendment for this illegal seizure. This remains a genuine issue for trial. See also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). By virtue of the 14th Amendment, the 4th Amendment embodies the right to be free from unreasonable searches by state officers. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 2390 (1995).

III. AT EACH LEVEL, COUNSELS FOR THE RESPONDENTS HAVE ADMITTED TO THIS ILLEGAL INTERCEPT BY RESPONDENT KRANTZ.

The arguments of both the School District's retained solicitor Rehmeyer, and the filings of Atty Sharon O'Donnell both added veracity to Walsh's claims. The lower court noted this on 22 Aug 08 (see lower court docket 72 at page 16, footnote 16), by stating, "The brief in opposition helps to elucidate allegations in the amended complaint." In the appellees brief, Attorney Gicking argues that Krantz illegal intercept was not intentional. Krantz remains bound to the

filings of his lawyers. This is a further admission and acknowledgement by Krantz counsels of his prohibited act. Further, at deposition, Krantz, in his third version of events, boldly claimed he walked in interrupted the telephone call and spoke to respondent Walsh directly, despite both persons legally on the phone denying that, and each of Krantz staff members stating me remained in the outer-office. No one; respondent, witness, or deposed staff member has corroborated Krantz third version of events. No one.

Further, within Krantz email of 29 Mar 06 at 01:06 PM he stated "...and complete some extra credit." This directly reflects on the second call Walsh made to the school that date, to discuss extra credit for respondent Young. Krantz could only have learned of this by having illegally eavesdropped on that second conversation, to which he adds his third version of events at deposition wherein he stated he barged in, interrupted the call and spoke directly to Petitioner Walsh (indicating he learned of the contents of that second protected call in that fashion). Either way, on top of the filings of the respondents counsels at all levels, Krantz stuck his EAR in where it did not belong and was not invited. It is again pointed out, no one, petitioners, deposed staff members, or the respondents corroborated Krantz's now third version of events. This remains a genuine issue for trial.

Further, Krantz third version of events, that he interrupted the protected call and spoke to Petitioner Walsh directly (this is false) also documents the 4th Amendment violation.

IV. THE LOWER COURT RELIED ON SPECULATIVE JUDICIAL ACTIVISM TO AWARD THE RESPONDENTS SUMMARY ACTION, THAT THE 3RD CIRCUIT FAILED TO RULE UPON. SEE FRAP 10(B)(2); UNSUPPORTED FINDING OF CONCLUSION.

The ruling panel of the 3rd Circuit failed to rule on the lower court's speculative Judicial activism; the lower court dreamed up the clause he used to throw this case out. Within his order of 18 Dec 09 (docket 202, page 3, item 10) (Appendix D) the lower court makes up his own hypothetical reason totally unsupported by the evidence. The lower court stated, "for instance, by unintentionally overhearing CRW mention it, or by speaking to someone else who knew it." (herein Appendix D, pg. 14a) This is a false conclusion and clearly speculative judicial activism. Both person legally on the phone, Appellants Walsh and CRW, emphatically stated Krantz was not spoken to during or after the second call on 29 Mar 06. Further, none of the appellees offered such testimony; it was conjured up by the lower court. See FRAP 10(b)(2). The 3rd Circuit ruling panel failed to rule on this issue properly captured for appeal.

V. RESPONDENT KRANTZ EVER CHANGING TESTIMONY.

At deposition, respondent Krantz, now, in this his third version of events, claimed to have entered Dr. Senft's office (where minor CRW was taking the call) interrupted the call and spoke directly to Petitioner Walsh. This is utterly false. No one, not petitioner,

witness, or respondent supported this now third version of events by respondent Krantz.

VI. THE LOWER COURT FAILED TO UPHOLD HIS EARLIER RULINGS REGARDING DISPOSITIVE MOTIONS.

The lower court within his order at docket no. 72, at page 27, paragraph 4b states,

> "The parties shall be permitted to file, on or before September 30, 2008, dispositive motions with supporting briefs and statements of material fact. See FRCP 56; LR 7.5, 56.1. Failure to file a supporting brief or statement of material facts in accordance with federal and local rules shall result in the motion being deemed withdrawn."

The lower court makes it clear a supportive Statement of Material Fact will be required, and the consequences of not complying with the Rules, both federal and local. The lower court continues this same emphasis in his orders at docket no. 76 and 103.

Despite clearly warning the respondents of the importance of a proper statement of material fact (App. Vol. I, pg. 55), the lower court reversed his position and allowed the respondents to submit an insufficient Statement of Material Fact. Chief Judge Thomas I. Vanaskie elaborated on the importance of counter affidavits or counter evidence while opposing a properly submitted statement of material facts, the respondents did neither. See Standing Practice Order 94-2 of 2 Dec 2005. The respondents failed to meet this

requirement. NO evidence is submitted at dockets 188 or 189. "One of the principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported... defenses, and we think it should be interpreted in a way that allows it to accomplish that purpose." *Celotex Corp v Catrett* 477 US 317, 324 (1986). The defendants submitted no evidence, and no opposing expert report. "If the evidence is merely colorable, *Dombrowski v Eastland* 387 US 82 (1967) (per curiam) or is not significantly probative, *Cities Services* 391 US 253 (1968), summary judgment may be granted." *Anderson v Liberty Lobby* 477 US 242 (1986). See also 244 US App DC at 167-168, F.2d at 189. *Wright, Miller and Kane* Federal Practice and Procedures 2720 pp 28-29 (1981). See also *Celotex* at footnote 3. The lower court has set aside not only the Federal and Local Rules, but has also failed to even uphold his earlier rulings in this important action. The prejudice to Petitioner Walsh and his sons is readily apparent. This is a genuine issue for trial.

At the time dispositive motions were due, Walsh still had three counts and three defendants going to trial. This remained a robust action, with numerous defendants, and numerous counts. Beyond the respondents failing to either support their motion with evidence as required, and a proper Statement of Material Fact as all decisions point to and required supporting evidence of affidavits (the appellees submitted none), Walsh properly opposed the respondents motion. Look at lower court docket numbers 190 and 191, they are loaded with evidence as the ruling decisions, and the rules in Middle District, particularly the rules of Thomas Vanaskie, the Chief Justice in that same courthouse, require. As discussed above, Walsh has bolstered his opposition with evidence, affidavits, expert reports,

witness testimony and police evidence, showing there are numerous issues for trial. Petitioner Walsh only had to establish that there is sufficient circumstantial evidence supporting his theory of the case to defeat the respondents motion. See generally *Barton v Curtis* 497 F.3d 331(3d Cir. 2007). Walsh has met his burden to defeat the respondents motion.

The respondents failed to bolster their statement of material fact, or counter statement of material fact with any evidence. With Walsh bolstering his motion for Summary Judgment with a huge amount of evidence, to support each count, the burden shifted to the respondents to proffer evidence that a reasonable jury could return a verdict in their favor. *Anderson v Liberty Lobby, Inc.* 477 US 242, 249 106 S. Ct. 2505, 2511 91 L.Ed 2d 202 (1986); *Brothers v Klevenhaven*, 28 F.3d 452, 455 (5th Cir. 1994). They did not. A proper motion for summary judgment (filed by Walsh) will not be defeated by merely colorable or insignificant probative evidence. *Anderson* at 249-50. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party (the appellees did not properly oppose Walsh's motion), there is no genuine issue for trial." *Matsushita Elec Indus Co, v Zenith Radio Corp.* 475 US 574, 587 106 S.Ct. 1348, 89 L.ED. 2d 538 (1986); *Federal Savings and Loan Ins, v Krajl* 968 F.2d 500, 503 (5th Cir. 1992). Per MD Pa. LR 72.2, Walsh was required to bring all discovery disputes with the assigned magistrate before the lower court. Walsh did on numerous occasions, see *United States v Renfro* 620 F. 2d 497 (5th Cir. 1980), and *United Steelworkers of Am. v New Jersey Zinc Corp.* 828 F.2d 1001, 1006 (3rd Cir. 1987). Walsh has shown the respondents continue to withhold evidence, particularly the heated emails from respondent Krantz when he attempted to order

Petitioner Walsh into his office from his place of work, after Walsh reported respondent Young abusing her students (Walsh refused; Petitioner Walsh finished junior high school some years ago). Not a single discovery dispute was resolved in Walsh's favor; Walsh as a disable Iraqi war veteran and single parent, has no rights in discovery, nor in the Middle District of Pennsylvania. See *Arthur v Maersk* 434 F.3d 196, 204 (3d Cir. 2006), *Foman v Davis* 371 US 178, 182 (1982) and *Howze v Jones* 740 F.2d 1208 (3d Cir. 1984).

Walsh should have been awarded summary judgment, or at least defeated the respondents cross motion and advanced to trial. As the Supreme Court stated in *Celotex Corp v Catrett* 477 US 317, 323 (1986), "... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* Walsh bolstered each count with hard evidence and testimony. The respondents failed to submit any evidence in rebuttal against Walsh's motion. See also 244 US App DC at 167-168 758 F.2d at 189 *Wright Miller and Kane* Federal Practice and Procedure 2720 pp. 28-29 (1983); "District Courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, as long as the losing party was on notice that [he] she had to come forward with all [his] her evidence." The respondents failed to do so. "When a motion for summary judgment is made and supported (Walsh did, the appellees did not) as provided in this rule (FRCP 56), an adverse party may not rest upon the mere allegations or denials in his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Celotex* at footnote 3.

VII. THE COUNSEL FOR THE RESPONDENTS BEFORE THE 3RD CIRCUIT ILLEGALLY MANIPULATED THE FILINGS OF PETITIONER WALSH AND THE 3RD CIRCUIT FAILED TO TAKE CORRECTIVE ACTION ON THIS NAKED ACT OF OBSTRUCTION OF JUSTICE.

Upon review of the opinion of the ruling panel, Respondent Walsh discovered the counsel for the respondents before the 3rd Circuit had illegally manipulated his filings, suppressing key evidence and planting their own evidence, then making it appear Walsh relied on it.

This is an incredible crime. Counsel for the respondents, Attorney James W. Gicking 46609 of the law firm Marshall, Dennehy, Warner Coleman & Goggin, has violated 18 U.S.C. § 1512 (b) by interfering with Petitioner Walsh's filings before the 3rd Circuit Court of Appeals. Rather than provide his input for the joint appendix, or legally bringing before the 3rd Circuit those items from the lower court record his clients wished to be considered by the ruling panel, Attorney Gicking relied on his criminal contacts within the 3rd Circuit and his own ability to interfere with the ECF system to not only chop up Petitioner Walsh's filings, but also to plant evidence and make it look like Walsh relied on those same useless filings.

Attorney Gicking has violated 18 U.S.C. §1512 (b), which also has extraterrestrial properties, and has brought criminal liability upon the educators who are paying him; respondent Krantz and the Dallastown Area School District Superintendent; Dr. Stewart Weinberg. When questioned over this crime by the Disciplinary Counsel for the Supreme Court

of Pennsylvania, Attorney Gicking did not deny his culpability. Attorney Gicking is prohibited from committing a crime on behalf of his clients by the Pennsylvania Rules of Professional Conduct. Gicking has also brought additional criminal culpability upon Krantz and Weinberg through 18 U.S.C. §1956 and possibly 18 U.S.C. §648. Krantz and Weinberg are utilizing public funds to pay these criminal lawyers to obstruct justice on their behalf.

To add insult to injury, the ruling panel claimed petitioner Walsh filed this planted evidence, and argued with it. This is incredibly false. When petitioner Walsh brought this incredible crime to the attention of the ruling panel, the ruling panel ordered, "No further submissions will be accepted for filing." See Appendix C.

CONCLUSION

This Federal action started with a crime (Krantz illegal eavesdropping on 29 Mar 06) **and ended with a crime** (Atty James W. Gicking of the law firm MDWC&G chopping up Petitioner Walsh's filings, then illegally locking Walsh's filings on 21 July 10 through the ECF system, which is also an internet crime).

This petition for Certiorari should be granted. Not only to allow Petitioner Walsh and his sons to confront Krantz and his abusive staff before a jury, to possibly gain compensation for these crimes and abuse as the laws allow, but also so that the community and state know of Krantz' abusive policies at the Dallastown Middle School, and the waste and abuse of public funding by Krantz and Weinberg as they pay their retained lawyers to commit crimes on their behalf at the 3rd Circuit Court of Appeals.

Petitioner Walsh and his sons humbly ask the Supreme Court of the United States that justice be done, and certiorari be granted.

Respectfully submitted,

Captain Rory M. Walsh USMCR (Ret.)
715 S. Hampton at Waterford
York, Pa. 17402
(717) 755-1251
Pro se

APPENDIX

NOT PRECEDENTIAL

APPENDIX A — THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10-1217

RORY M. WALSH, individually and as Natural Guardian of C.R.W., a minor,

Appellant

v.

DR. ROBERT KRANTZ; MRS. SHARI YOUNG; MRS. SUE CATHCART; MRS. KEENEY; MRS. KELLY HEISEY; UNKNOWN DALLASTOWN STAFF MEMBER; DR. STEWARD WEINBERG; DALLASTOWN AREA SCHOOL DISTRICT; CATHY STONE; GREG ANDERSON,

Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civ. No. 07-cv-00616)
District Judge: Christopher C. Conner

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 9, 2010

Before: FUENTES, GREENAWAY and VAN ANTWERPEN, Circuit Judges

(Opinion filed: July 12, 2010)

OPINION

Appendix A

PER CURIAM

Appellant Rory M. Walsh filed a civil action pro se in United States District Court for the Middle District of Pennsylvania against the Dallastown Area School District and a number of its officials and staff members, including then Principal Dr. Robert Krantz, Shari A. Young, Assistant Principal Sue A. Cathcart, Judy Keeney, Kelly Heisey, Superintendent Dr. Stewart Weinberg, Steven L. Turner, and an "unknown Dallastown staff member.[1]" Walsh filed the action on behalf of himself individually and his son, C.R.W., a Dallastown Area Middle School student, who attended the 7th grade during the 2005-2006 school year.

Walsh's original complaint set forth nine counts: (1) conspiracy in violation of 18 U.S.C. § 241; (2) conspiracy in violation of civil rights, 42 U.S.C. § 1985(3); (3) a Privacy Act violation, 5 U.S.C. § 552; (4) a violation of 18 U.S.C. § 119; (5) a Federal Wiretapping Act violation, 18 U.S.C. §§ 2510-2520; (6) a violation of 47 U.S.C. § 605 on unauthorized publication or use of communications; (7) a Pennsylvania Wiretap Act violation, 18 Pa. Cons. Stat. Ann. §§ 5703, 5704, 5725; (8) civil rights violations, 42 U.S.C. § 1983; and (9) a violation of 18 U.S.C. § 875 on interstate communications.

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1. Walsh also named the Pennsylvania Department of Education as a defendant. The District Court dismissed this defendant pursuant to the Eleventh Amendment, see Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1983), and Walsh has not challenged this determination in his brief on appeal. The issue of this defendant's dismissal is thus waived. See Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993).

The claims related to two telephone calls Walsh made on March 29, 2006 to C.R.W. at the Middle School, the first to Dr. Krantz and the second to C.R.W. Walsh alleged that Dr. Krantz, with the assistance of an unknown Dallastown staff member and without authorization, eavesdropped on his telephone conversation with his son. Walsh also raised specific complaints about how he and his son were treated by school personnel. Walsh sought $600,000.00 in damages.

The defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In an order entered on June 4, 2008, the District Court dismissed all claims based on federal criminal statutes (Counts One, Four, and Nine) because the specified statutes did not provide for a private right of enforcement, and private parties generally lack authority to enforce federal criminal statutes, see Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 86-87 (2d Cir. 1972). The District Court also dismissed the section 1985(3) claim (Count Two) for lack of an allegation that any race- or class-based discriminatory animus motivated the defendants' conduct, Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). In addition, the court dismissed the Privacy Act claim (Count Three) against the School District and Cathcart because the Act applies only to federal agencies, 5 U.S.C. § 552a(b); 5 U.S.C. § 552(e). See Schwier v. Cox, 340 F.3d 1284, 1287-88 (11th Cir. 2003) (Section 3 of Privacy Act applies only to federal agencies and sets forth an individual's right to records of federal agencies and right to be protected

from disclosure of records by federal agencies).[2]

As to Walsh's allegation that his Fourteenth Amendment substantive due process rights had been violated, the District Court determined that the alleged conduct of the defendants — recommending that C.R.W. be tested, changing due dates of assignments, calling Walsh names and otherwise attempting to precipitate an event at his residence, and restricting Walsh's access to the school — did not shock the conscience, see Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008) ("To establish a substantive due process claim, a plaintiff must prove the particular interest at issue is protected by the substantive due process clause and the government's deprivation of that protected interest shocks the conscience."). The court also found no plausible substantive due process claim in Walsh's allegation that Assistant Principal Cathcart improperly informed C.R.W.'s teachers that Walsh had refused to allow C.R.W. to be tested. Accordingly, these section 1983 claims were dismissed.[3]

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2. The District Court correctly determined, for the reasons given by the court, that Counts One, Two, Three, Four, and Nine of the original complaint were subject to dismissal under Rule 12(b)(6) for failure to state a claim that is plausible on its face. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). We will affirm these determinations, which do not require additional discussion.

3. We agree with the District Court that the complaint failed to allege a plausible substantive due process violation. See Iqbal, 129 S. Ct. at 1949. We affirm this determination, which does not require additional discussion.

The District Court allowed Walsh's federal and state wiretapping counts and section 1983 Fourth Amendment count to proceed, and granted Walsh leave to amend with respect to his count based on 47 U.S.C. § 605.

Walsh then filed his amended complaint, in which he added new claims, including one on behalf of C.R.W. and his other child, S.J.W., for breach of fiduciary trust, an individual claim and claims on behalf of C.R.W. and S.J.W. for intentional and negligent infliction of emotional distress, and a claim pursuant to 42 U.S.C. § 1981. The defendants responded by filing a motion to dismiss the amended complaint, Fed. R. Civ. Pro. 12(b)(6). In an order entered on August 22, 2008, the District Court finally dismissed Walsh's claim of a violation of 47 U.S.C. § 605, because the amended complaint did not allege an interstate or foreign communication, see id. at 6050)(1).[4] The court dismissed the Pennsylvania Wiretap Act count brought on behalf of C.R.W. because, as the recipient of the communication at issue, he lacked standing, and the court dismissed the state wiretap count altogether as to the School District pursuant to its immunity from suit under the Political Subdivision Tort Claims Act, 18 Pa. Cons. Stat. Ann. § 8541.[5]

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4. We affirm this determination, which does not require additional discussion. See Iobal, 129 S. Ct. at 1949.

5. Walsh has not challenged these two determinations in his brief on appeal and they are thus waived. See Kost, 1 F.3d at 182.

In the same order, the District Court dismissed the breach of fiduciary trust claim. Walsh alleged in the amended complaint that Dr. Weinberg and Kelly Heisey breached a fiduciary duty by ordering the Special Education Office to deliver a request for evaluation of C.R.W. to Walsh, and that Cathy Stone and Greg Anderson breached their fiduciary duty by attempting to assign S.J.W. to a lower grade level in math and refusing to discuss the matter with Walsh. The District Court concluded that no plausible claim was stated sufficient to survive a Rule 12(b)(6) motion, because the defendants' alleged conduct involved only recommendations, which Walsh subsequently rejected — a rejection school personnel accepted, see Bottorf v. Waltz, 369 A.2d 332, 334 (Pa. Super. Ct. 1976) (discussing basic duties involved in teacher-student relationship, including duty to exercise good judgment).

The District Court dismissed the intentional infliction of emotional distress count pursuant to Rule 12(b)(6) because the conduct alleged — belittling insults, heated emails, demands for C.R.W. to undergo educational testing, attempts to restrict S.J.W. from being taught at his grade level, threats to have Walsh arrested — was not outrageous and extreme, see Swisher v. Pitz, 868 A.2d 1228, 1231 (Pa. Super. Ct. 2005) (for tort of intentional infliction of emotional distress to proceed conduct alleged must be extreme and outrageous), and the court dismissed the negligent infliction of emotional distress claim because all of the conduct alleged was intentional. The claim under 42 U.S.C. § 1981 was dismissed because Walsh did not allege that he or his sons belonged to a protected class, or that the defendants acted with an intent to discriminate

on the basis of race. See Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 569 (3d Cir. 2002).

The District Court referred all discovery matters to the Magistrate Judge and discovery then ensued. Walsh deposed several of the defendants and the defendants deposed Walsh. At the conclusion of discovery, the remaining defendants moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). After the Magistrate Judge filed a Report and Recommendation, the District Court, in an order and judgment entered on December 18, 2009, granted the defendants' motion.[6] Walsh appeals.

We will affirm. We have jurisdiction under 28 U.S.C. § 1291. Walsh contends on appeal that summary judgment on the federal and state wiretap and Fourth Amendment claims was improper and the District Court ignored his expert report; the District Court should have recused; discovery was improperly limited and the District Court improperly barred him filing any further motions for reconsideration; he was improperly denied the opportunity to amend his complaint for a second time; and his section 1981, breach of fiduciary trust, and intentional and negligent infliction of emotional distress claims were improperly dismissed.

Our review of the District Court's grant of summary judgment is plenary and we must affirm if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

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6. Walsh's summary judgment motion was denied.

See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. Pro. 56(c) (effective through November 30, 2009).[7] Under Rule 56(c), the moving party must show that there is an absence of evidence to support the nonmoving party's case. See id. Once the moving party has met this burden, the nonmoving party may not rest upon his allegations and arguments; rather, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. Pro. 56(e)(2). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A plaintiff cannot avoid summary judgment with speculation; he must provide competent evidence from which a rational trier of fact can find in his favor. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999).

The defendants plainly met their burden under Rule 56(c), and thus Walsh was required to go beyond his pleadings and allegations, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 US. at 324 (quoting Rule 56(e)(2)).

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7. Rule 56(c) was amended effective December 1, 2009, and continues to provide that: "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c)(2).

A material factual dispute is a dispute as to a factual issue that will affect the outcome of the trial under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). We conclude that summary judgment in favor of Dr. Krantz and the School District was proper on Walsh's individual Federal Wiretapping Act claim and claim on behalf of C.R.W. Under the Federal Wiretapping Act, any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication" violates the Act. 18 U.S.C. § 2511(1)(a). The Act defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).

During the first telephone call on the morning of March 29, 2006, Walsh spoke with Dr. Krantz and asked him to relay a message to C.R.W. Walsh placed a second call and spoke directly to C.R.W., who was allowed to take the call either in Dr. Krantz's or another administrator's office. Walsh contended that Dr. Krantz had the technology to eavesdrop on his call to C.R.W., and in fact intentionally listened in. Dr. Krantz testified in his deposition that C.R.W. took the call from Walsh. Dr. Krantz left the office where C.R.W. took the call and went out into the outer office area and talked to the secretaries. The District Court properly concluded that there was no evidence upon which a rational trier of fact could find that Dr. Krantz intercepted the second telephone call in violation of federal law. There were eye-witnesses to the events in question, they were deposed by Walsh, and they provided no support for his

allegation that Dr. Krantz intercepted the call through use of any "electronic, mechanical, or other device." 18 U.S.C. § 2510(4).

Walsh contends in his brief on appeal that a triable issue of material fact was established by his expert report, two emails from Dr. Krantz, and C.R.W.'s affidavit. Walsh supplied a letter from an expert, who stated that an Avaya Telephone Set 6416D has conference call capabilities. But, even if the Middle School Office had conference call capabilities, that fact alone is not probative of whether Dr. Krantz used conference call capabilities to listen in. Furthermore, nothing in the contents of the two emails sent that morning by Dr. Krantz to Walsh provided evidence that Dr. Krantz listened in on another telephone while C.R.W. was talking to Walsh. The two emails indisputably do not provide direct evidence of an interception,[8] and inference of an interception cannot reasonably be drawn from the emails.

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8. At 1:06 p.m., Dr. Krantz wrote:

Mr. Walsh,

[C.R.W.] informed me that you had asked him to give his outline (or finish) to Mr. Hartman and complete some extra credit. He was pulled from math class to talk with you. I would prefer not to call him between classes or during class for phone calls and allow him to focus on subject work. I had previously talked with C.R.W. about the Assignment. Just let us know to remind him and give him positives about. Assignments. We need to work together utilizing the best possible practices and I believe that the emailing and assignment book, along with counselor, teacher, and principal reminders will bring about positive results.

Bob

(cont'd pg. 11a)

Walsh contended that Dr. Krantz could not have referenced an "outline" and "extra credit assignment" in those emails unless he had been listening in, but this is speculation. Walsh provided no evidence that would create a reasonable inference that Dr. Krantz could not have learned of the outline and the extra credit work by means other than intercepting the call. Similarly, nothing in C.R.W.'s affidavit supports directly or circumstantially Walsh's allegation that Dr. Krantz listened in on another telephone during C.R.W.'s conversation with Walsh.[9]

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8. (cont'd.) After receiving a response from Walsh, in which he complained that his access to C.R.W. was being blocked, Dr. Krantz wrote:

It is never my intent to block your access to your son, but I must keep instructional time as a priority for the sake of your son and our responsibility from a parent and principal standpoint. I have continued to monitor the team's approach with students. It is important that we continue a positive working relationship to keep [C.R.W.] on track, but also make him responsible.

Bob

9. In his affidavit, C.R.W. stated: "During 29 March 06, early in the day, Dr. Krantz, the principal of the Dallastown Middle School, approached me and informed me my dad had called to remind me to turn in my outline to Mr. Hartman. Later that same day, my dad called and reminded me that I also had to see Mrs. Young during 9th period to complete my extra credit project for the 3rd Marking Period. I completed both tasks. Dr. Krantz did not speak to me again that day."

Inasmuch as Dr. Krantz did not "intercept" the telephone call, logically he could not have "disclosed" the content of the call to a third person, or "used" any information disclosed during the call for any purpose, 18 U.S.C. § 2511(1)(c), (d). Accordingly, Dr. Krantz and the School District were entitled to summary judgment on the Federal Wiretapping Act claim. The provisions of Pennsylvania's Wiretap Act applicable to this case are substantially the same as the provisions of the Federal Wiretapping Act. The state wiretap act is interpreted in the same way as the federal Act. See Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 113 n.6 (3d Cir. 2003). Accordingly, Dr. Krantz also was entitled to summary judgment on Walsh's individual claim of a violation of the Pennsylvania Wiretapping Act.

To establish a section 1983 claim, a plaintiff must demonstrate a deprivation of a "right secured by the Constitution and the laws of the United States ... by a person acting under color of law." See Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996). The Fourth Amendment, upon which Walsh's individual section 1983 claim and claim on behalf of C.R.W. are based, prohibits unreasonable searches and seizures. Soldal v. Cook County, Ill., 506 U.S. 56, 62 (1992). Application of the Fourth Amendment depends on whether the person invoking it can claim a reasonable expectation of privacy. Smith v. Maryland, 442 U.S. 735, 740 (1979). Here, Walsh did not provide evidence that either he or C.R.W. had a reasonable expectation of privacy in the second telephone call. The call was made through a telephone line to the Middle School, it was taken in a school administrator's office, and there is no evidence that either Walsh or C.R.W. asked for

privacy. What a person knowingly exposes to the public is not entitled to Fourth Amendment protection. See Katz v. United States, 389 U.S. 347, 351 (1967). The District Court properly determined that the defendants were entitled to summary judgment on the Fourth Amendment claim.

Turning to the remaining issues, during the time when discovery was ongoing Walsh filed a motion to recuse, which the District Court denied. After the District Court denied appeals from the Magistrate Judge's orders resolving discovery disputes, Walsh filed a second motion for recusal. That motion was denied. We conclude that the District Court properly declined to recuse. We have reviewed the entire record and there is no basis for reasonably questioning the District Court's impartiality, 28 U.S.C. § 455(a). See Liteky v. United States, 510 U.S. 540, 550-51 (1994) (judge is not recusable for bias or prejudice where his knowledge and negative opinion were acquired during the course of proceedings). See also Securacomm Consulting, Inc. v. Securacom, Inc., 224 F.3d 273, 278 (3d Cir. 2000)(party's displeasure with legal rulings does not form an adequate basis for recusal). With respect to 28 U.S.C. § 144, Walsh's affidavit does not evince bias that is personal in nature, see United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973).[10]

10. In his reply brief Walsh states that the District Court's negative view of him can be traced to an earlier lawsuit, Walsh v. United States, D.C. Civ. No. 05-cv-00818, but the District Court was thorough in its approach to the allegations in the instant lawsuit, and did not base its judgment on the lack of merit in the prior case. See Walsh v. United States, 328 Fed. Appx. 806 (3d Cir. 2009) (affirming grant of summary judgment and holding that former marine's conclusory accusations of general's involvement in home invasions were insufficient to establish liability under Fourth and Fifth Amendments).

Walsh contends that his right to discovery was improperly restricted. He states, for example, that the roster of administrative personnel was withheld from him until the last day of discovery, see Appellant's Brief, at 24. Walsh filed a number of motions for reconsideration of various orders resolving discovery matters, culminating in the District Court's March 20, 2009 order, in which the court stated that it would not consider any further motions requesting that it reconsider its earlier decisions. We conclude that the District Court did not abuse its discretion in the management of discovery in this case, see In re: Fine Paper Antitrust Litig., 685 F.2d 810, 817 (3d Cir. 1982) (matters of docket control and conduct of discovery are committed to the sound discretion of the district court). The record reflects that Walsh was given ample time to conduct discovery, he did in fact depose several witnesses and submit an expert report, and he has not pointed to any evidence that would have affected the outcome of the trial under the governing law, Anderson, 477 U.S. at 248, had discovery been extended. Cf. Fed. R. Civ. Pro. 56(f) ("If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: *** (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken").

We conclude that leave to file a second amended complaint to add additional substantive due process allegations — that Stone attempted to block S.J.W. from being kept at grade level for math, that she recommended that S.J.W. be held below grade level, that Stone and Anderson refused to discuss that recommendation,

that Cathcart was the driving force behind the actions regarding S.J.W. — properly was denied because the conduct alleged does not shock the conscience. See Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000) (leave to amend may be denied if amendment would be futile). Walsh also alleged that Keeney, a secretary, was the "unknown Dallastown staff member," and he sought to amend his complaint accordingly. This request also properly was denied because an amendment to name Keeney as the unknown Dallastown staff member would have been futile. Walsh's evidence of a federal or state wiretap violation or Fourth Amendment violation was insufficient to withstand a motion for summary judgment against anyone, including Keeney.[11] Last, we agree with the District Court, for the reasons given by the District Court, that Walsh's amended complaint failed to state a plausible section 1981 claim, claim for breach of fiduciary trust, or claim for intentional and negligent infliction of emotional distress sufficient to survive a Rule 12(b)(6) motion to dismiss. See Iqbal, 129 S. Ct. at 1949.

For the foregoing reasons we will affirm all orders of the District Court. The appellant's motion to vacate the Clerk's Order of May 18, 2010 is denied.

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11. The District Court sua sponte granted summary judgment in favor of the "unknown Dallastown staff member."

APPENDIX B — UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10-1217

RORY M. WALSH, individually and as Natural Guardian of C.R.W., a minor,

Appellant,

v.

DR. ROBERT KRANTZ; MRS. SHARI YOUNG; MRS. SUE CATHCART; MRS. KEENEY; MRS. KELLY HEISEY; UNKNOWN DALLASTOWN STAFF MEMBER; DR. STEWARD WEINBERG; DALLASTOWN AREA SCHOOL DISTRICT; CATHY STONE; GREG ANDERSON

Appellees,

— SUR PETITION FOR REHEARING EN BANC —

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR.,, VANASKIE and *VAN ANTWERPEN, Circuit Judges

*Judge Van Antwerpen's vote is limited to panel rehearing only.

Appendix B

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,
Is/ Julio M. Fuentes,
Circuit Judge

DATED: August 5, 2010

SLC/cc: Rory Walsh, James G. Gicking
and John J. Hare

APPENDIX C — THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 6, 2010

No. 10-1217

RORY M. WALSH
Petitioner-Appellant

v.

DR. ROBERT KRANTZ
(M.D. Pa. Civil No. 1-07-00616)
Respondent-Appellee

Motion by Appellant titled "Appellant's Second Motion for Summary Action."

(August 6, 2010)

Before FUENTES, GREENAWAY, JR., and VAN ANTWERPEN, Circuit Judges

/s/ Shannon L. Craven
Case Manager (267) 299-4959

ORDER

The foregoing motion is DENIED. No further submissions will be accepted for filing.

By the Court,
/s/ Julio M. Fuentes, Circuit Judge

Dated: August 10, 2010
SLC/cc: Rory M. Walsh, James W. Gicking and John J. Hare

APPENDIX D — IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:07-CV-0616
(Judge Conner)

RORY M. WALSH, individually and as Natural Guardian of C.R.W., a minor,
Plaintiff

v.

DR. ROBERT KRANTZ, UNKNOWN DALLASTOWN STAFF MEMBER, and DALLASTOWN AREA SCHOOL DISTRICT,
Defendants

ORDER

AND NOW, this 18th day of December, 2009, upon consideration of the report of the magistrate judge (Doc. 195), recommending that the motion (Doc. 182) for summary judgment filed by defendants Krantz and Dallastown Area School District be granted, and that the motion (Doc. 184) for summary judgment filed by plaintiff be denied, that summary judgment be entered *sua sponte* in favor of defendant unknown Dallastown staff member, and that the case be closed, and upon further consideration of the objections (Doc. 199) filed by plaintiff,[1]

1. The court is mindful of plaintiff's pro se status, which plaintiff emphasized in his objections to the report of the magistrate judge (Doc. 199 at 1-2). Even with a liberal construction of plaintiff's pleadings, however, the court cannot conclude that plaintiff has come forward with sufficient evidence to avoid summary judgment. See infra note 5.

and, following an independent review of the record, it appearing that plaintiff claims that defendant Krantz eavesdropped on a telephone conversation between plaintiff and his son C.R.W.[2]

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2. Many of the underlying facts that form the basis of plaintiff's claims are undisputed. Plaintiff is the father of minor C.R.W., who attended seventh grade in Dallastown Area Middle School during the 2005-2006 school year. (Doc. 182, Statement of Material Facts ("SOMF") 1111 1-2; Doc. 191 111 1-2.) On the morning of March 29, 2006, plaintiff exchanged emails with one of C.R.W.'s teachers, Mr. Hartman, discussing an outline which C.R.W. was required to turn in. (Doc. 191, Ex. H.) On the same morning, plaintiff corresponded with another one of C.R.W.'s teachers, Ms. Young, regarding an assignment for extra credit. (a.) Plaintiff also made two telephone calls to the school to speak with C.R.W. that same morning. (Doc. 182, SOMF 7 4; Doc. 191 11 4.) Plaintiff did not speak to C.R.W. during the first call; rather he spoke to Krantz, the school principal, who offered to relay a message from plaintiff to C.R.W. (Doc. 182, Ex. A at 26; Doc. 182, SOMF 113; Doc. 191 11 3.) When plaintiff placed the second call, he spoke to C.R.W. (Doc. 182, SOMF 11 6; Doc. 191 116.) That afternoon, Krantz sent plaintiff an email which included references to both the outline and the extra credit assignment. (Doc. 191, Ex. D.) Plaintiff claims that Krantz "had no way of knowing" about both assignments unless he had eavesdropped on plaintiff's conversation with C.R.W. (Doc. 182, Ex. A at 28-30.)

in violation of the Federal Wiretapping Act, the Pennsylvania Wiretap Act, and the Fourth Amendment,[3] and it further appearing that defendants contend that plaintiff has failed to establish a violation of any of these laws,[4]

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3. Plaintiff filed an amended complaint which raised additional claims (see Doc. 52), but the court dismissed plaintiffs other claims when it granted in part defendants' motion to dismiss, (see Doc. 72). The court notes that, in his objections to the report of the magistrate judge, plaintiff vaguely complains that Krantz "disclosed" the contents of the conversation by referencing them "in an insecure email." (Doc. 199 at 28; see also id. at 23, 29.) This allegation is not supportive of his pending claims, because, for the reasons discussed infra note 5, no reasonable trier of fact could conclude from plaintiff's evidence that Krantz obtained the information contained in his email through the interception of plaintiff's telephone call. See 18 U.S.C. § 2511(1)(c).

4. Defendant Krantz also claims immunity, pursuant to the Political Subdivision Tort Claims Act, see 18 PA. CONS. STAT. ANN. § 8545, with respect to plaintiff's claim under the Pennsylvania Wiretap Act. The court's conclusion that Krantz is entitled to summary judgment obviates the need to address his alleged entitlement to immunity. The court notes, however, that a government official will not be shielded by immunity if his actions resulted from "willful misconduct." See id. § 8550. Plaintiff accuses Krantz of intentional conduct, outside the scope of his authority, for which Krantz would not be entitled to immunity. Therefore, analysis of the immunity issue merges with the court's analysis as to whether plaintiff can survive summary judgment on the merits of his Pennsylvania Wiretap Act claim.

and the court finding that there are no genuine disputes as to any material facts,[5]

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5. Plaintiff's objections to the report of the magistrate judge make much of the existence of disputed facts. The court acknowledges that there are several disputes of fact in the instant case. For instance, the parties dispute which of C.R.W.'s assignments plaintiff discussed with Krantz during the first telephone call. There is also a dispute as to whether C.R.W. used the telephone in Krantz's office or the telephone in the office of Mr. Senft to take his father's second call. Another disputed issue is whether Krantz spoke to plaintiff or to C.R.W. at any point during the second call. In addition, there is a dispute regarding Krantz's ability to intercept the second telephone call from another telephone in the office. A disputed issue also arises from plaintiff's allegation that Krantz was subsequently removed from his position involuntarily over the incidents at issue in the instant case. Some of these disputes of fact are not "genuine" disputes, and, as the magistrate judge correctly noted, none are "material," due to the inadequacy of plaintiffs evidence.

In ruling on defendants' motion to dismiss, the court must view the evidence in the light most favorable to plaintiff. See McGlinchey v. Hartford Accident & Indem. Co., 866 F.2d 651, 653-54 (3d Cir. 1989). Assuming, arguendo, that plaintiff's evidence on each disputed fact is credible and persuasive, it still does not suffice to support a verdict in his favor; and defendants are therefore entitled to summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-57 (1986). Plaintiff invites the court to infer, inter alia, that Krantz had the ability to intercept the call at issue, that he did in fact intercept it, and that he could not have known about C.R.W.'s extra credit project unless he intercepted it However, plaintiff has not presented affirmative evidence from which a reasonable trier of fact could conclude that these allegations are true. (cont'd pg. 24a)

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5. (cont'd) Specifically, plaintiff has not shown that there was no other way for Krantz to find out about the extra credit assignment. Plaintiff asserts that he and C.R.W. did not speak with Krantz about it. Indeed, he argues at length that he misspoke in his deposition when he stated that his first telephone call dealt with the extra credit assignment, and he offers explanations to reduce the impact his error. (See Doc. 199 at 2, 7-9, 11, 20.) Plaintiff alleges that he actually discussed the outline during the first call, and the second call dealt with the extra credit. (I at 2, 3, 7, 12, 27, 29.) All of these arguments are immaterial. Even if plaintiff did not mention C.R.W.'s extra credit project during his first call, and even if neither he nor C.R.W. discussed it with Krantz at any other time, that would not inevitably point to the conclusion that Krantz must have learned about it by intentionally intercepting plaintiff's second call. There is no evidence showing that Krantz could not have found out about the extra credit another way—for instance, by unintentionally overhearing C.R.W. mention it, or by speaking to someone else who knew of it.

Furthermore, plaintiff has not shown that Krantz had the ability to intercept and listen to plaintiffs call. Plaintiff's evidence, when viewed in the light most favorable to plaintiff, indicates that a user of one of the school's telephones had the ability to add or drop parties in a conference call. However, the technology required to intercept a call is distinct from conference capabilities. Defendants have presented testimony from Judy Keeney, a secretary who worked at the school, that the telephone system would not enable a person to pick up a telephone and intercept a conversation being conducted on another telephone. (Doc. 182, Ex. F at 15.) Even if the court assumes that another person could have used the conference call feature to add Krantz to plaintiff's call, the availability of that technology is plainly inadequate to prove that Krantz did, in fact, intercept the call in question.

Plaintiff's failure to show that Krantz intercepted plaintiff's call also affects the viability of plaintiff's Fourth Amendment claim. Establishing a violation of the Fourth Amendment requires plaintiff to show that defendant invaded his reasonable expectation of privacy. Insofar as plaintiff fails to (cont'd pg. 25a)

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5. (cont'd) show that Krantz intercepted plaintiff's call, plaintiff must show that Krantz invaded his privacy by learning of C.R.W.'s extra credit project through some other action—e.g., overhearing the...telephone conversation, or hearing about the extra credit from another source. Assuming, *arguendo*, that plaintiff or C.R.W. subjectively harbored an expectation that the school principal would not learn of the content of their conversation by any means, the magistrate judge correctly concluded that such an expectation was not reasonable. Therefore, all of plaintiff points relating to his alleged expectation of privacy (see Doc. 199 at 5, 20, 23, 25) are immaterial.

In sum, plaintiff's evidence could not lead any reasonable jury to reach a verdict in plaintiff's favor, and a trial on his claims would therefore be an empty and unnecessary formality. See FED. R. Civ. P. 56(c).

and the court concluding that plaintiff's evidence is insufficient to establish the essential elements of his case, see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and that plaintiffs arguments regarding defendants' "lack of evidence" are therefore immaterial,[6] and the court further concluding that plaintiff's argument that Krantz admitted liability is frivolous,[7]

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6. For the reasons set forth in the report of the magistrate judge, a reasonable trier of fact could not find that defendants violated any of the laws plaintiff invokes. The court notes that plaintiff appears not to understand the burden of proof that he bears. He asks the court to rule on his cross motion for summary judgment and suggests that there must be some discussion of "defendants [sic] lack of evidence in rebuttal." (Doc. 199 at 4; see also id. at 32.) Plaintiff also argues that defendants have failed to produce evidence supporting their position on various points. (See id. at 7, 9, 27, 31, 32.) However, it is plaintiff's burden to establish the elements of his case, and for the reasons already discussed, he has failed to do so. Therefore, plaintiff could not possibly demonstrate that he is entitled to judgment as a matter of law, regardless of any evidence that defendants presented or failed to present.

7. Plaintiff argues that defendant Krantz's claim of immunity "is tantamount to an admission of liability." (Doc. 199 at 19.) In support of his contention, plaintiff cites Thomas v. Nakatani, 309 F.3d 1203 (9th Cir. 2002). Not only is the instant case disanalogous to Thomas, but also, Thomas would not support finding "an admission of liability" even in an analogous case. Plaintiff seems to misunderstand the Ninth Circuit's statement that "the survival of the section 1983 claim . . . against Nakatani, which is in reality a claim against Hawaii, is tantamount to an admission on the part of Hawaii that it still can be sued . ." Id. at 1207. Although the Ninth Circuit concluded that Hawaii could be sued, there was no admission of liability. Plaintiff's reliance on Thomas is misplaced, and his argument is frivolous.

and that plaintiff's request to name Judy Keeney as the unknown Dallastown staff member is futile,[8] it is hereby ORDERED that:

1. The report of the magistrate judge (Doc. 195) is ADOPTED.

2. Defendants' motion for summary judgment (Does. 182) is GRANTED.

3. Plaintiffs motion for summary judgment (Does. 184) is DENIED.

4. Summary judgment is GRANTED in favor of defendant unknown Dallastown staff member.

5. The Clerk of Court is instructed to enter JUDGMENT in favor of defendants and against plaintiff on all claims.

6. The Clerk of Court is directed to CLOSE this case.

S/ Christopher C. Conner

CHRISTOPHER C. CONNER
United States District Judge

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8. Plaintiff has already filed a motion to replace the unknown Dallastown staff member with Judy Keeney, and the magistrate judge has denied it as futile, on the basis that plaintiff failed to state an adequate factual basis for his assertion that she participated in eavesdropping. (See Doe. 176.) Plaintiff's evidence against Keeney remains insufficient to withstand a motion for summary judgment, and therefore, the court agrees that to name Keeney as the unknown Dallastown staff member would be futile.